Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1765

ARTHUR ANDERSEN & Co.,

Petitioner,

v.

DAVID S. STEWART and CHANNING SECURITIES, INC.,

Respondents.

ARTHUR ANDERSEN & Co.,

Petitioner,

v.

JULES SANDERS and MADALYNN SANDERS,

Respondents.

AND THREE OTHER ACTIONS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 79-1765

Arthur Andersen & Co.,

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v.

David S. Stewart and Channing Securities, Inc.,

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Arthur Andersen & Co.,

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Jules Sanders and Madalynn Sanders,

Respondents.

And Three Other Actions

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This brief is submitted in opposition to the Petition of Arthur Andersen & Co. ("Andersen") for a Writ of Certiorari to review the January 22, 1980 judgment and opinion of the United States Court of Appeals for the First Circuit, which dismissed Andersen's appeal for lack of standing and on grounds of estoppel. Andersen's Petition does not raise the "special and important reasons" which

are prerequisites for issuance of the writ. The primary issues upon which Andersen seeks review were never addressed by the Court of Appeals because the appeal was dismissed on other grounds. The decision below creates no conflict among circuits, is consistent with the decisions of this Court, and is eminently correct. There is no basis whatsoever for issuance of a writ of certiorari.

Jurisdiction

Andersen claims that appellate jurisdiction existed under 28 U.S.C. § 1291 and under the collateral order doctrine set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The respondents herein ("plaintiffs") took the position that the orders appealed from were interlocutory with respect to Andersen and that no basis for appellate jurisdiction existed. The Court of Appeals never decided the question of appellate jurisdiction because it dismissed the appeal for lack of standing and estoppel.

Questions Presented

1. Does a non-settling defendant in a class action have standing to challenge the form and method established for effectuating notice of a proposed partial settlement where the notice of pendency of class action was disseminated at an earlier date, the non-settling defendant is not a member of the class, and the interests of the non-settling defendant are in no way affected by the proposed settlement?*

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* As shown below, Andersen has conceded its lack of standing to challenge the notice of partial settlement. Respondents include the standing issue in "Questions Presented", however, because despite Andersen's concession, the Petition nevertheless seeks review of the form and method of the notice of partial settlement.

2. Is it within the discretion of a federal court to hold that a class action defendant is estopped from challenging the validity of a notice of pendency of class action when the defendant affirmatively consented to the method of notice of pendency, massive discovery occurred thereafter in reliance upon the validity of the notice, and five years elapsed before—on the eve of trial and only after announcement of a proposed partial settlement with other defendants—the defendant raised any questions with respect to the adequacy of the notice of pendency?

3. Did the form and method of the notice of partial settlement provided to class members in these actions comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure and with the due process clause of the United States Constitution?*

Statement of the Case

(a) *District Court Proceedings*

This litigation consists of five actions alleging violations of the federal securities laws in connection with the issuance of a December 1969 Registration Statement and Prospectus and subsequent documents concerning Viatron Computer Systems Corp. ("Viatron"). Defendants included Viatron's officers and directors; petitioner Andersen, which is the accounting firm which certified Viatron's financial statements; the underwriters of Viatron's December 1969 $25 million debenture issue; and various other defendants.

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* Andersen seeks to raise the issue of adequacy of notice before this Court despite the fact that the Court of Appeals never addressed that issue. Respondent believes that, in consequence, there is no basis for consideration of the notice issue by this Court. Respondent includes that issue among "Questions Presented" only because the issue is raised by Andersen in its Petition.

By orders entered February 26, 1974, the District Court certified *Sanders* v. *Bennett* and *Stewart* v. *Bennett* as class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure.* Pursuant to those orders, a joint notice of pendency of class action was mailed to all transferees of record of the relevant Viatron securities during the class periods and was published in the Wall Street Journal. The District Court requested Andersen to review the proposed order on behalf of defendants, and Andersen expressly consented to the method of providing notice of pendency set forth in the February 26, 1974 orders (See R. App., p. 1a).**

After extensive discovery (including very substantial document inspection and over 100 days of depositions), and after many months of intensive negotiations, plaintiffs reached an agreement, subject to approval of the District Court pursuant to Federal Rule of Civil Procedure 23(e), to settle the class claims against the underwriter defendants for an aggregate of $1,850,000. Andersen raised various objections to the form and method of notice of the proposed partial settlement, including arguments (a) that the proposed method of notice did not comply with Rule 23(c)(2) of the Federal Rules of Civil Procedure because it involved insufficient efforts to identify beneficial owners of securities purchased in nominee name; and (b) that the notice of settlement should include a statement that class members still had the alternative of opting out of the class. The lat-

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* *Sanders* was certified as a class action on behalf of all persons who acquired Viatron common stock between December 23, 1969 and April 29, 1971. *Stewart* was certified as a class action on behalf of all persons who purchased Viatron debentures between December 23, 1969 and December 17, 1971.

** References to "R. App." are to the Respondents' Appendix annexed to this brief.

ter argument was raised on the theory that the 1974 notice of pendency of class action was also deficient because it allegedly failed to provide for sufficient efforts to identify the beneficial owners.

The District Court rejected Andersen's arguments in a context where all parties had agreed to the propriety of the 1974 notice; substantial efforts to identify beneficial owners were contemplated and ultimately were made in connection with dissemination of the notice of partial settlement (R. App. pp. 2a-4a; App. pp. 19, 22);* Andersen's interests were not affected by the partial settlement; and the underwriter defendants, who were paying $1,850,000 which would be at risk if notice were not sufficient, were in agreement with the proposed form and method of mailing and publication. Andersen's motion for District Court certification of an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) from the May 7, 1979 order approving the form and method of notice was denied; nevertheless, Andersen filed a notice of appeal from that order.

In an order and final judgment entered August 15, 1979, the District Court approved the partial settlement over the objections of Andersen. (App. 24) Andersen appealed from the August 15 order and the two appeals were consolidated. Neither notice of appeal purported to appeal from the order approving the method of dissemination of the notice of pendency of class action in 1974. Rather, Andersen appealed only from the May 7, 1979 order approving the form and method of providing notice of the proposed partial settlement (R. App. p. 5a) and from the order approving the stipulation of partial settlement itself (R. App., p. 6a).

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* "App." references are to pages in the Appendix to Andersen's Petition.

(b) *The Court of Appeals Decision*

The First Circuit unanimously held that Andersen lacked standing to object to the notice of proposed settlement since Andersen was not a class member, and since Andersen's *res judicata* rights could not be affected by a settlement to which Andersen was not a party (App. pp. 4-6). The Court convincingly rejected Andersen's argument that it should have standing to object to the order approving the notice of settlement to protect the interests of absent class members. The First Circuit recognized that the defendants who were parties to the settlement agreement had stronger interests than Andersen in insuring that adequate notice was given so as to protect themselves against collateral attack on the settlement by absent class members at a later date (App., p. 6). In addition, the absent class members were also protected by the responsibility of the District Court to assure adequacy of notice. In light of such considerations, the Court of Appeals held that the speculative benefits to the absent class members of allowing a non-settling defendant to object to a notice of settlement would be outweighed by the risk that non-settling defendants would employ such objections in an effort to frustrate the settlement process.* (App., pp. 6-7)

The Court of Appeals further held that on the specific facts of this litigation, Andersen was estopped to appeal the propriety of the 1974 notice of pendency of class action in 1979. It recognized that Andersen never objected to the

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* The record below showed that Andersen had regularly objected to partial settlements in other suits in which it was a defendant in an effort to increase its own bargaining leverage. Andersen's objections to such partial settlements have routinely been denied. See, *In re Bermec Corp.*, Nos. 71B 291 (CMM) and 73 Civ. 388 (CMM) (S.D.N.Y., June 23, 1978); *Greenfield* v. *Mattel, Inc.*, CV 73-515-MML (C.D. Cal., Order filed April 6, 1976).

1974 order "until five years later after extensive discovery had passed, and it is not in the position of being able to proffer any excuse for its long delay in recognizing what it now claims to be a major defect in the 1974 notice, since the primary authority for its attack on the notice is the *Eisen IV* decision of 1974." (App. 7)

In light of its disposition, the First Circuit did not address the questions concerning adequacy of notice which were raised by Andersen and which constitute the primary questions which Andersen wishes this Court to consider. (App., p. 4) For the same reason, the Court of Appeals did not address the issue whether the 1979 orders were appealable in a context where neither order constituted a final decision with respect to Andersen's involvement in the action.* (App., p. 4 n.3)

(c) *Activities Subsequent to the Court of Appeals Decision*

Subsequent to the decision of the Court of Appeals, plaintiffs entered into another partial settlement agreement with a further group of defendants under which it is proposed that the claims against those defendants will be settled for an additional cash payment of $2,000,000.00.**

At the same time that this latter settlement was materializing, Andersen continued its efforts to obstruct and delay the litigation by taking groundless steps to obtain appellate review of district court orders. In an opinion

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* See, *e.g., Darrow* v. *Southdown, Inc.*, 574 F.2d 1333, 1336 n.3 (5th Cir. 1978), *cert. denied,* —— U.S. ——, 99 S. Ct. 574 (1978), holding that a decision approving a settlement which is a final decision as to the settling parties is not a final decision with respect to non-settling defendants.

** The parties have not yet submitted to the District Court a proposed order with respect to the form and method of notice of this latter proposed settlement.

dated May 22, 1980, the First Circuit denied what it characterized as Andersen's "unusual petition for mandamus seeking reversal of several interlouctory orders. . . ." (R. App., p. 7a) *In re Arthur Andersen & Co.,* No. 80-1148. In the course of that opinion, the First Circuit criticized what it characterized as Andersen's "megadefense" which had produced a massive stream of defense activities calculated to confuse and delay the case. The First Circuit stated that it could not find "any arguable justification for challenging a [district] court under these circumstances," and indicated that it would have awarded double costs or counsel fees to plaintiffs had they been sought. (R. App., p. 16a) Such decision by the Court of Appeals provides further ground for concluding that the appeal which gave rise to the instant Petition was designed not to protect the legitimate interests of Andersen or the class, but was simply an element in Andersen's "megadefense" designed to further impede and obstruct the litigation.

Notwithstanding such efforts by Andersen to delay and confuse the litigation, the trial of this action against Andersen and the remaining non-settling defendants commenced May 27, 1980, and is currently in progress.

REASONS FOR DENYING THE WRIT

The Petition Does Not Present the "Special and Important Reasons" Which Are Essential to Issuance of the Writ.

Under Rule 19 of the Rules of this Court, certiorari will be granted "only when there are special and important reasons therefor." Examples of the reasons which would be considered are stated in Rule 19 to include the rendering of a court of appeals decision which conflicts with a decision of another court of appeals; which decides an important question of federal law which should be settled by this Court; or which decides a federal question in a way which conflicts with applicable decisions of this Court. As shown below, none of the issues raised by Andersen fall within such categories or represent "special and important reasons" to be reviewed by this Court.*

(a) ***Lack of Standing***

The Petition impliticly concedes that Andersen has no standing to contest the propriety of the notice of partial settlement. Neither of the "Questions Presented for Review" in the Petition challenges the correctness of the ruling that Andersen lacked standing to attack the 1979 orders. Nor does the Petition set forth any argument that the First Circuit's decision conflicts with other decisions dealing with a non-settling defendant's standing to attack the form or procedure of a notice of settlement.

In fact, there is substantial authority denying non-settling defendants standing to object to court orders ap-

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* Nor does Andersen suggest, or would there be any basis for concluding, that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." See Rule 19(b).

proving partial settlements or to object to the procedures employed by the district court in approving such settlements. *E.g., In Re Beef Industry Antitrust Litigation,* 607 F.2d 169, 172-73 (5th Cir. 1979). See also *Seiffer* v. *Topsy's Int'l, Inc.,* 70 F.R.D. 622, 627-8 n.5 and n.6 (D.Kan. 1976); 3 *Newberg on Class Actions* § 5660b at 564-65 (1977). As recognized by the First Circuit, Andersen's right to bind the class is not affected by a judgment which terminates the action only as to others.

Contrary to Andersen's proclaimed concern to protect its interest in finality of litigation, it seems clear that Andersen's only real interest in its attack on the notice of settlement was its desire to delay the partial settlement and to impede any final resolution of the class members' claims against Andersen. See discussion above at p. 8. As recognized by the Fifth Circuit, the objections of a non-settling defendant are particularly suspect, since the real interest of such an objector is to forestall any settlement which does not include that objector. *Darrow* v. *Southdown, Inc., supra,* 574 F.2d at 1336 and n.3. In light of the strong public policy favoring settlement of litigation (*e.g., D.H. Overmeyer Co.* v. *Loffin,* 440 F.2d 1213, 1215 (5th Cir. 1971)), this Court should not condone and encourage such activities by Andersen.

(b) *Estoppel*

Nor does Andersen raise any "special and important" issue in seeking review of the holding that it was estopped from challenging the adequacy of the 1974 notice of pendency of class action. The First Circuit did not purport to enunciate any general rule that a class action defendant could never challenge the adequacy of a notice of pendency of class action to which the defendant had originally agreed. Rather, the First Circuit relied on the specific facts of

the present record in holding only that an estoppel as to *this* defendant in *this* case existed. Consequently, this litigation provides no basis for the elaboration of any general rule concerning estoppel. As recognized by Mr. Justice Frankfurter, certiorari is inappropriate where, as here, resolution of the question at issue will determine only the matter at hand and will not have general application. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

The First Circuit had ample ground to hold that an estoppel existed on the record below. Andersen had actually been given the responsibility by the Court for representing the defendants in determining the propriety of the 1974 notice, and Andersen had not objected to that notice. (R. App., p. 1a) Thereafter, five years elapsed, during which extremely extensive discovery occurred and a highly complicated litigation was brought to the eve of trial, all in reliance upon the understanding of the parties that a class had been properly certified and that the extent of any exclusion requests was known. The case upon which Andersen primarily relies in its Petition with respect to notice requirements, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), was decided in 1974. *In re Franklin National Bank Securities Litigation*, 574 F.2d 662 (2nd Cir. 1978), *modified*, 599 F.2d 1109 (2nd Cir. 1979), upon which Andersen also relies was decided a full year before Andersen raised any complaints. Andersen did not challenge the 1974 notice until a partial settlement agreement was reached with other defendants in 1979. Under such facts, it was clearly within the authority of the Court of Appeals to determine that Andersen was estopped from raising the issue of the 1974 notice. See, *e.g.*, discussion of the doctrine of judicial estoppel in *In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975).

Such a decision does not conflict with any decisions of this Court or of the Circuit Courts. Contrary to Andersen's argument, the First Circuit did not hold that a class designation or a decision concerning adequacy of notice is immutable; nor did it hold that in no circumstances will a defendant ever be allowed to challenge the adequacy of notice already given and consented to. Nor is there anything in the opinion to suggest that if a notice of pendency was insufficient in the rare situation where a defendant was estopped from challenging that notice, a class member who did not receive notice would not be able to obtain relief from his inclusion within the class. The decision on estoppel was carefully limited to the facts of this case, and does not represent a decision of general importance with respect to which a Writ of Certiorari should issue.

(c) *Purported Issues Concerning the Form and Method of Notice to Class Members*

Andersen tries to create the impression that important issues are raised concerning class action notice procedures. On the contrary, the Court of Appeals expressly refused to address any questions concerning the adequacy of notice, and dismissed the appeal on other grounds. In consequence, there is no decision on a question of notice procedure for this Court to review, and there is no conflict among the Circuits for this Court to resolve.

This Court has often recognized that it would be inappropriate to issue a writ for the purpose of determining constitutional questions when such determinations are unnecessary to the resolution of the case. *E.g., Duncan* v. *Tennessee,* 405 U.S. 127 (1972); *Piccirillo* v. *New York,* 400 U.S. 548 (1971). Such considerations apply in the present case, where Andersen seeks to raise due process issues under the Fifth Amendment despite the fact that the Circuit

Court never addressed such issues and found other grounds dispositive.

There is no basis for this Court to conclude that the opinion of either the District Court or the Court of Appeals creates a conflict among federal courts concerning notice requirements. It is uncontested that all the parties including Andersen agreed that the 1974 orders were appropriate at the time they were issued; that the notice requested any nominees to whom it was mailed to retransmit the notice to the beneficial owners; and that at least 12,880 of the 13,960 persons to whom the 1974 notice was mailed were in fact beneficial owners (R. App. p. 3a). Furthermore, there is no basis for consideration of the 1974 orders, since Andersen appealed only from the 1979 orders (R. App. pp. 5a-6a) and was properly held estopped from challenging the 1974 orders at this late date. With respect to the 1979 orders, the record shows that very substantial efforts were made to identify beneficial owners in connection with the distribution of the notice of partial settlement. (App., p. 22; R. App. pp. 2a-4a)* In such a context, neither the District Court nor the Court of Appeals decision represents any conflict with notice requirements as discussed in *In Re Franklin National Bank Securities Litigation, supra* or in *Eisen IV*. The notice procedures implemented by the District Court in 1979 would fully comply with the requirements suggested by any authority cited by Andersen and may actually exceed the "reasonable effort" standard mandated by Rule 23(c)(2) for a notice of pendency.**

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* No objections to the proposed settlement were received subsequent to such notice procedures, further suggesting the lack of any reason to question the validity of the 1974 notice.

** It should be noted that the notice of partial settlement below was not issued pursuant to the mandatory notice provisions of Rule 23(c)(2). Rather, that notice was issued pursuant to Rule 23(e) which states that a notice of proposed dismissal or compro-

(Footnote continued)

In its Petition, Andersen has changed its position and is no longer treating the sufficiency of either the 1974 or the 1979 notice as the essential issue. Rather, Andersen now argues that whenever, subsequent to the issuance of a notice of pendency of class action, the parties are able to identify certain class members whose names and addresses were not known at the time the notice of pendency was issued, the Court must offer those newly identified class members the right to opt out of the class.

This question was neither raised before nor addressed by the Court of Appeals. The question is inapplicable in the present instance both because Andersen is estopped to challenge the 1974 notice of pendency and because adequate notice was provided in 1974 to all the members of the classes by a combination of mailings to the known beneficial owners and the nominees of the unknown beneficial owners with a request to retransmit the notice, and through publication. Under Rule 23(c)(2), individual notice of pendency of class action is not required to be given to each and every class member, but only to those class members "who can be identified through reasonable effort." Once a reasonable effort has been made, class members who do not request exclusion from the class "by a specified date" are bound by the results of the class action. Rule 23(c)(2). While a district court has the authority to relieve a class member who did not receive notice from the effect of the judgment, the class member must carry the burden of affirmatively showing that he did not receive notice and

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mise "shall be given to all members of the class in such manner as the court directs." It has been held that such language does not incorporate the individual notice requirements of Rule 23(c)(2), but is "measured against the broader standards of due process to which the class action procedure is of course subject, rather than the requirements of rule 23(c)(2) as interpreted in *Eisen*." *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1126-27 (9th Cir. 1977).

that his delay in coming forward is excusable. *E.g., In re National Student Marketing Litigation* v. *The Barnes Plaintiffs,* 530 F.2d 1012 (D.C. Cir. 1976).

Under such authority (and contrary to Andersen's argument), beneficial owners of nominee name securities who were not on plaintiff's mailing list are not thereby entitled to sit on the sidelines with impunity and decide whether or not to collaterally attack the judgment if they are unsatisfied with the result. Rather, it is Andersen's approach which would have detrimental results both with respect to the public policy of seeking to avoid one-way intervention and the administrative complexity of class actions. The fact that a beneficial owner of a nominee name security was not actually mailed the notice of pendency does not mean that he was not apprised of the existence of the class action. Often (as here) there will have been publication notice which informed him of the pendency of the action. In many instances, nominees will have retransmitted the notice to the beneficial owner. In consequence, establishing a rule that subsequent identification of the class member entitles him to a second opportunity to opt out would encourage the very sideline sitting and one-way intervention which Andersen says it wishes to avoid.

Unless the parties can rely on the deadline for exclusions in the notice of pendency as being the date after which the essential character of the class will have been determined, the parties will be left in serious uncertainty concerning the nature of the class. That uncertainty could undercut settlement negotiations and would involve significant questions concerning the binding effect of any judgment in the class action. Such disadvantages would be further compounded by the fact that a requirement of mailing a new invitation to opt out to any beneficial owner who becomes

known subsequent to the deadline for exclusions would add greatly to the administrative complexity of the class action. There is no practical way to distinguish those many class members who received the 1974 notice from those few who did not. Accordingly, a new invitation to opt out would give many persons a "second shot" at opting out contrary to the spirit of Rule 23.

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
June 5, 1977

Respectfully submitted,

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APPENDIX

Transcript of District Court Proceedings, February 26, 1974, pp. 10-12

[10] * * *

The Court: All right. What is your [11] pleasure, gentlemen: Can Mr. Moulton [attorney for plaintiffs] take care of these revisions and just submit it to the Court for signature or is it necessary for us to convene once again for that purpose?

Doesn't seem to me that I need you people here to sign it. As a matter of fact, I'm going to be here all day. You people, I guess, are going to be able to be here for a little while. Might be able to accomplish it while I'm here, and I can sign it a little later.

Mr. Moulton: Yes. I think I recollect that we agreed that we would also put in a reference to the list as being an exhibit which will be filed with the clerk. So that there will have to be some textual change, but I can have it done today and have it in your Honor's hands by the end of the day.

The Court: Can we all agree that that is an appropriate procedure?

Perhaps you can show the document to Mr. Lewald [attorney for Andersen] as being the document that I am to sign with the agreement of all parties, if his satisfaction would be agreeable to all the other parties. Is that all right with everybody? Is that all right with you, Mr. Lewald?

Mr. Lewald: Yes, your Honor.

[12] The Court: Okay. We will proceed that way. When you and Mr. Lewald agree on a final document, you can mail it to me or have it delivered to the clerk, and I will execute it, and we will notify you that it is executed.

* * * * *

Letter of Plaintiffs' Attorneys to Judge Tauro dated June 28, 1979

June 28, 1979

Honorable Joseph L. Tauro
U.S. District Judge
John W. McCormack Post Office
and Courthouse
Boston, Massachusetts 02109

Re: Viatron Computer Systems Corporation
Securities Litigation
No. MDL-138-T

Dear Judge Tauro:

Pursuant to the order signed by you May 7, 1979, plaintiffs are scheduled to mail notice of the hearing on the proposed partial settlement with the underwriters on July 5, 1979, and to publish notice of the proposed settlement on that same date. Your order provides that plaintiffs shall take such reasonable steps as the Court determines are necessary to identify and provide notice to beneficial purchasers and shall periodically report to the Court thereon (Order, page 5, paragraph 2(c)).

This letter will constitute a report to the Court with respect to the steps plaintiffs' counsel have taken to identify and provide notice to beneficial purchasers. Plaintiffs have caused the lists of record purchasers to be reviewed to extract therefrom those persons whose names suggested that they might be nominees. For instance, names which appear to be brokeage firms, banks, investment houses and the like, were compiled from the original list of record holders. The

Letter of Plaintiffs' Attorneys to Judge Tauro dated June 28, 1979

original mailing list of Viatron purchasers of record included approximately 11,560 purchasers of common shares and approximately 2,400 purchasers of debentures. Of those two lists, approximately 1,080 names which appeared to be nominees were extracted. Letters were sent to those persons in the form included as Exhibit C to the documents pertaining to the partial settlement previously submitted to the Court, requesting that those persons notify us of the identity of the beneficial purchasers for whom they purchased and offering to pay each of them the reasonable costs of their search. (The letter stated that reasonable costs were anticipated to be $200 or less unless we approved greater expenses.) Of the 1,080 letters mailed, approximately 330 have been returned as undeliverable. Presumably, the apparent nominees to whom those letters were addressed have gone out of business, moved or merged. We have been attempting to locate those nominees, and about 50 of them have been located and recontacted to supply the identity of beneficial purchasers.

With respect to the remainder, we have to date received approximately 20 responses which have encompassed approximately another 125 names. Moreover, pursuant to the Court's order of May 4, the settling underwriters, who constituted the selling syndicate with respect to Viatron's offering of December 1969, have supplied to us approximately 1,450 additional names of beneficial purchasers for whom said underwriters acted as nominee.

We are informed by underwriters' counsel that generally the underwriter syndicate accounts for a sizeable percent-

age of the nominee trading in any security, at least in the time frame reasonably close to the offering.

* * *

Respectfully yours,

MILBERG WEISS BERSHAD & SPECTHRIE

By /s/ JARED SPECTHRIE
Jared Specthrie

MOULTON & LOONEY

By /s/ STEPHEN MOULTON
Stephen Moulton

cc: All Counsel

Notice of Appeal dated June 4, 1979

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

MDL-138-T

In Re: VIATRON COMPUTER SYSTEMS CORPORATION

Notice is hereby given that defendant Arther Andersen & Co. hereby appeals to the United States Court of Appeals for the First Circuit from the order attached hereto as Exhibit A and entered in this action on the 7th day of May, 1979.

Dated: June 4, 1979

ARTHUR ANDERSEN & Co.

By its attorneys

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Notice of Appeal dated August 24, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Consolidated No.: MDL-138-T
Civil No.: 71-3022, 73-2594, 72-3376, 72-3375
75 Civ. 5668 (MBF)

In Re: VIATRON COMPUTER
SYETEMS CORPORATION

Notice is hereby given that Arthur Andersen & Co., a defendant in these consolidated actions, hereby appeals to the United States Court Of Appeals For The First Circuit from the Order And Final Judgment, approving the Stipulation Of Settlement dated November 29, 1978, between the plaintiffs and the defendant underwriters, which was entered in this action on the 15th day of August, 1979.

ARTHUR ANDERSEN & Co.
By its attorneys,
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Dated: August 24, 1979

In re Arthur Andersen & Co., No. 80-1148
(1st Cir., May 22, 1980)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1148

In re
ARTHUR ANDERSEN & Co.,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS
[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
ALDRICH and BOWNES, *Circuit Judges*.

George H. Lewald, with whom Thomas G. Dignan, Jr., William F. McCarthy, Steven T. Hoort, Jess T. Fardella, Ropes & Gray, Charles W. Boand, and *Wilson & McIlvaine* were on brief, for petitioner.

Jared Specthrie, with whom *Edwin J. Mills, Milberg, Weiss, Bershad & Specthrie, Stephen Moulton,* and *Moulton & Looney* were on brief, for respondents.

May 22, 1980

COFFIN, *Chief Judge.* This is an unusual petition for mandamus seeking reversal of several interlocutory orders entered by the district court. The orders arise out of a lawsuit by two classes of purchasers of securities of a company (Viatron) against various officers and directors of the

company, and its suppliers, auditors, underwriters and consultants because of the alleged furnishing of false information on which they relied to their detriment. Petitioner, Arthur Andersen & Co., the auditor of Viatron, seeks mandamus review of orders denying motions to see and copy proofs of claim of alleged purchasers of Viatron debentures and common stock. Petitioner also seeks mandamus review of an order denying a motion for leave to file a cross-claim and third party complaint naming Arthur D. Little, Inc. (Little) as a defendant.

One of the plaintiff classes brought its lawsuit in 1971, the other in 1973, Anderson being a defendant in both cases. Little was made a defendant in 1975. In 1978 plaintiffs entered into a settlement with Viatron's underwriters. In later 1979 and early 1980 another settlement was negoated between plaintiffs and Little and various of Viatron's suppliers.

On May 7, 1979, the district court issued an order to implement the settlement with the underwriters, fixing the procedures for testing the fairness and adequacy of the settlement and for determining distribution of the partial settlement fund. In connection with the latter, the court required that each class member desiring to participate file a proof of claim, postmarked no later than October 3, 1979, by sending it to the Clerk of the court at a post office box rented at the expense of plaintiffs' counsel "for the purpose of receiving proofs of claim and other communications from class members with regard to the [notice of hearing on fairness and stipulation of settlement]. The post office box to be used was in the General Post Office in the city of New York. The notice sent to class members pursuant to the May 7 order concluded by saying, under

the caption "Court File Available", "All documents filed in the Actions may be inspected at the office of the Clerk of the United States District Court for the District of Massachusetts . . . ."

Andersen moved, on November 21, 1979, for access to inspect and copy the proofs of claim on the ground that they were court records. This was denied without opinion on December 6, 1979. A motion for rehearing was denied on January 11, 1980. On January 15, 1980, Andersen again sought access to the proofs of claim via a motion to reopen discovery (which the court on June 5, 1979, ordered completed by August 17, 1979) on the ground that proof of damages, presumably derivable from data in the proofs of claim concerning net proceeds of sale, is "an integral part of plaintiffs' alleged causes of action". This motion was denied on January 16, 1980.

Meanwhile, Andersen had moved for leave to file a cross-claim and third party complaint against Little on January 11, 1980.[1] Pointing out, with a sense of inverse relevance, see n. 1, that if its motion were denied, it would be the only one to receive this disposition, Andersen urged that a separate suit against Little could be avoided and that Little could "in no way" be prejudiced. On January 18, 1980, the district court, rehearsing the history of four years of

[1] Some fourteen other cross-claims and third party complaints had, after hearing and/or submission, been granted by a magistrate on October 29, 1979. Despite a colloquy on May 4, 1979, in which the district court, commenting on Andersen's fear of inconsistent results if suit in an action for indemnity were to be brought in another forum, raised the possibility of a cross-claim in the instant litigation, Andersen took no action for the next eight months. Subsequent to the denial of the motion for leave to file, Andersen initiated two independent actions against Little, one in New York and one in Massachusetts.

discovery leading to the settlements and leaving only essentially the litigation between plaintiffs and Andersen, denied the motion.

Perhaps the most palpable impression we distill from our reading of the record in this case is that of what might be called a megadefense. The extent to which even in this small salient of a much wider front a stream of motions, memoranda, requests for clarification and reconsideration can be filed on multiple issues without surcease is truly impressive.

To begin with, it ought not be, but it is, necessary to observe the severe standards which govern the issuance of mandamus. Andersen properly invokes *Kerr* v. *United States District Court*, 426 U.S. 394 (1976), citing to some of the prerequisites of "extraordinary circumstances"; the lack of other means to attain relief; and establishing an indisputable right to the writ. *Id.* at 403. The Court uses even stronger language in equating "exceptional circumstances" to "a judicial 'usurpation of power' ". *Id.* at 402. We have echoed these criteria and specifically have noted their inapplicability "to obtain review of an otherwise unreviewable interlocutory order". *USM Corp.* v. *GKN Fasteners, Ltd.*, 574 F.2d 17, 23 (1st Cir. 1978).

With these brooding admonitions hovering over us, we consider each of the three purported bases for mandamus. The first is the motion for access to the proofs of claim based simply on the grounds of their alleged status as court records. Andersen's authorities are, to say the most, less than dispositive. *International Business Machines Corp.* v. *Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975), says simply that "the trial record is composed of the proceedings in the District Court including all papers, exhibits,

and affidavits on file with the court", adding, "It is not the type of paper submitted but rather the fact of filing which determines whether a particular item will be included in the record." *Id.* For this latter proposition, it cites *Todd* v. *Nello L. Teer Co.*, 308 F.2d 397 (5th Cir. 1962), which involves a letter from an attorney to a trial judge attempting to retract a concession as to a point of law. The letter was marked "filed", bore notations presumably by the judge indicating his denial of a motion enclosed with the letter, and was in fact placed on the court file. That such a letter was held part of the record can shed little light on our present inquiry.

References to the treatises suggest that some closer nexus to the judge or clerk must be intended before a paper becomes part of a case record, at least for purposes of FRAP Rule 10.[2] In 9 Moore's Federal Practice, ¶ 210.04, at 10-14, we read, "The term original papers refers, then, to all papers presented to the district court and filed in the record and to all papers filed by the district court itself." In 16 Wright and Miller, Federal Practice and Procedure, § 3856, at 386, the definition, if anything, is narrower: "Under [Rule 10(a)], only those matters that were in fact presented to the district court are considered part of the record on appeal; matters that were merely lodged with the clerk or never offered in evidence are excluded from the definition."

Whether the proofs of claim, even if they are potential record material, were "filed with the court" in accordance

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[2] Rule 10(a) reads:

"Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries . . . shall constitute the record on appeal in all cases."

with Rule 5(a), Fed. R. Civ. P.,[3] presents another problem. In 4 Wright and Miller, *id.* at § 1153, at 599, the authors pointed out that some courts have held that filing was not accomplished-even by leaving a notice under the door of the clerk's office after hours, and that uncertainty is best avoided by personal delivery, whether at the clerk's office or his home. *See also* 2 Moore, *id.*, ¶ 5.11, at 1391-92. Moreover, the case authorities on depositions indicate that they do not become part of the record until they are presented to the court. *Dictograph Products Co.* v. *Sonotone Corp.*, 231 F.2d 867 (2d Cir. 1956); *Daiflon, Inc.* v. *Allied Chemical Corp.*, 534 F.2d 221 (10th Cir. 1976), *cert. denied*, 429 U.S. 886 (1976); *Busse* v. *United States*, 542 F.2d 421 (7th Cir. 1976).

Andersen also seeks support from a statute designed, we think, more for archival guidance than for court operations, 28 U.S.C. § 457. This merely provides that court records are to be kept where the court sits. Were this, however, to be taken literally, it would cut against any claim that the proofs of claim ordered to be sent to New York were part of the records of a case in a Massachusetts district court. Or, if the statute be thought to require that such proof ought never have been ordered sent to New York in the first place, the absurdity of the barrier thus erected to efficient processing of claims is apparent.

Our distillation from all this is that we are not sure that the proofs of claim sent to the New York postal box

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[3] Rule 5(3) reads:

"Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him. . ."

are yet case "records", or that, if they are, they are presently disclosable to Andersen. We doubt that Andersen can have such a present interest in the statements of plaintiffs who have chosen to settle with other defendants, such plaintiffs not by any means necessarily being all of the plaintiffs who are suing Andersen. Moreover, the fact that the court-approved notice to claimants ends with a reference to the "court file" being subject to inspection in Massachusetts suggests an intent that proofs of claim in the processing, winnowing, and correcting stage have not yet reached the status of case records filed in court. But whatever our doubts may be as to these matters we are crystal clear that whether or not Andersen has a right to these records can be determined by proper motions at later stages of this litigation and that the district court's denial of this first motion cannot, with any composure, be termed a usurpation of power.

Andersen's second basis for mandamus lies in the court's denial of its motion to gain access to the proofs of claim, not because they were court records, but because the information in the hands of plaintiffs' counsel was discoverable since it bore on verification of proof as to damages. The existence of a megadefense was underscored in the documents submitted to the court revealing that Andersen contemplated calling as witnesses "[r]esearch analysts of every broker, mutual fund or other institutional investor who has filed a proof of claim", and "[e]very individual who, and a financial officer of any corporation, partnership, association or other entity which, filed a proof of claim." Andersen has proposed a minimum of some 65 pages of special questions to be put to the jury, many of them requiring specific findings as to each class member. Another

proposed list of some 60 voir dire questions, to be asked every juror, included inquiries as to whether the jurors were related to or acquainted with any of the 2400 plaintiffs or their counsel.

In support of its argument that the material sought in the discovery motion is relevant to its defense, Andersen pointed out in its motion that the data contained in the proofs of claim would be relevant to determining damages. In addition, in its argument, Andersen asserts that the combination of data on the state residency of claimants and the dates of purchase and sale would bear on the questions of whether each plaintiff purchased in justifiable reliance on alleged misrepresentations or sold with actual knowledge of misstatements or facts sufficient to put one on inquiry.

The original ground for discovery assigned, relevance to damages, obscures the basic proposition that plaintiffs bear the burden of proof. When, whether, and to what extent use of data in the proofs of claims may be relevant, e.g., for impeachment purposes, will depend on whether the issue of damages is severed and made the subject of separate proceedings. *See* 3B Moore's *Federal Practice*, ¶ 23.02, p. 23-65, and ¶ 23.46, p. 23-407. The reasons subsequently assigned as justifying immediate and mandatory discovery are no more persuasive. Residence of a plaintiff at the time of purchase, rather than at the time of filing proof of claim would seem to be the only relevant data bearing on the appropriate limitations period. Insofar as reliance is concerned, this may or may not be a matter for individual proof; in the latter event it most likely would be addressed in a severed proceeding. But in any case the mere amounts and dates of purchases and sales are not, at least facially,

demonstrably relevant to whether or not a plaintiff used due diligence. The extent to which information from each class member may be used in attempting to establish plaintiffs' case or may be relevant in defense will depend in large part upon decisions made by the court in its continuing and demanding task of managing this litigation. *Cf. Blackie* v. *Barrack,* 524 F.2d 891 (9th Cir. 1975).

At this stage, the eve of trial between plaintiffs and Andersen, we see no abuse of discretion, certainly no usurpation of power, and no lack of remedy if Andersen were subsequently to feel deprived of information essential to its defense.

We come, finally, to Andersen's eleventh hour motion for leave to file a cross-claim and third party complaint against Little. The district court very cogently invoked *In re Cessna Distributorship Antitrust Litigation,* 532 F.2d 64 (8th Cir. 1976), which is comprehensively apposite. There the delay in filing a cross-claim was only three not four or five years. There, as here, the court faced a complex, hard earned settlement, the benefits of which would have been largely negated by allowing the cross-claim. There, as here, the movant was still able, if losing the instant litigation, to bring a separate action over for indemnity or contribution.

In this case trial is now, after prolonged preliminaries, set for May 27, 1980. Were Little to be brought in at this late date,[4] not only would it be deprived of much of the near term peace for which it has bargained but trial would

[4] Andersen cites as reason for its delay a secret agreement which it had with Little tolling the statute of limitation. While this agreement may have made the delay possible, however, it in no way constitutes a justification for the delay in filing the claim in the face of the district court's repeated entreaties and efforts to conduct the litigation efficiently.

most probably be postponed for a substantial period to allow preparation. And the issues would perforce be extended to cover not only plaintiffs' diligence and reliance, Andersen's conduct and the reasonableness thereof, but also Little's conduct and its reasonableness, which would also trigger an inquiry into the conduct of vendors and their reasonableness. Moreover, if Andersen were to prevail, any action over against Little would be mooted.

We said at the outset that this was an unusual petition. We so bespoke ourselves in view of the conjunction of orders which are only interlocutory or subject to broad discretion, or both; the questionable or at least fragile posture of petitioner's claim; and the fact that other avenues of adequate relief are available. Having in mind the austere standards governing the dispensation of mandamus, we cannot find any arguable justification for challenging a court under these circumstances. Plaintiff-respondents, however, have not sought double costs or counsel fees and we shall not venture where they have been reluctant to tread.

The petition for writs of mandamus is denied.